

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Verizon Communication Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI.

Application 05-04-020
(Filed April 21, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING
ON APPLICANTS' MOTION FOR HEIGHTENED PROTECTION
OF HIGHLY CONFIDENTIAL THIRD PARTY DATA**

1. Summary

This ruling denies the joint motion of Verizon Communications Inc. (Verizon) and MCI, Inc. (MCI) (collectively, Applicants) for heightened protection of highly confidential data of Verizon's wholesale customers. The motion was presented for filing on July 29, 2005¹. A response was filed on August 3, 2005, by Qwest Communications Corporation (Qwest). Under this ruling, certain in-house counsel and in-house staff of competitive companies that are preparing testimony and evidence in this proceeding and who are not

¹ The Commission's Docket Office notified Applicants that their motion could not be formally filed until Applicants provided a required proposed order, pursuant to Resolution ALJ-164. In order to avoid delay, this ruling acts upon the motion under the assumption that Applicants will promptly correct their filing as instructed by the Docket Office.

involved in marketing, will continue to have access to competitively sensitive information under strict conditions.

2. Applicants' Motion

In a previous ruling on July 15, 2005², Applicants' motion for special protections for what are termed Highly Confidential documents of Verizon and MCI that were produced at the Federal Communication Commission (FCC) was granted in part and denied in part. Applicants state that they do not seek to revisit that issue in this motion. However, they state that the arguments previously advanced prior to the July 15 order did not specifically address a subset of the information produced by Verizon in response to FCC discovery that contains Highly Confidential information on Verizon's wholesale customers. Applicants ask the Commission to restrict disclosure of such wholesale customers' Highly Confidential data only to outside counsel and outside consultants of their competitors, particularly since many of these wholesale customers are not parties to this proceeding. If granted, the order would prohibit access to such documents by in-house counsel and other employees of competitor companies.

Applicants state that it was only in preparing to share the entire FCC production with commercial parties in accordance with the July 15 order that Applicants became aware of the inclusion of third-party data that may not be appropriate to be shared with employees of competitors of those third parties. According to Applicants, these documents include third-party proprietary information about facilities, customers, business strategies and pricing options.

² Administrative Law Judge's Ruling Granting, in Part, Motion for Protective Order, July 15, 2005.

Under the FCC order, these Highly Confidential documents can only be disclosed to competing parties' outside counsel and outside experts solely for use in the FCC proceeding.

According to Applicants, the July 15 order granted in part and denied in part Applicants' motion to afford *their* Highly Confidential documents the same protection afforded by the FCC, but did not specifically address the need for heightened protection of *third-party* Highly Confidential data. Applicants state that their request for relief here is narrowly tailored. They ask that the Commission, like the FCC, permit disclosure of such third-party Highly Confidential information only to commercial parties' outside counsel and outside experts solely for use in this proceeding. Verizon states that these documents, comprising approximately 35,000 pages, can be identified and segregated from the remainder of the approximately 200,000 pages of FCC documents being produced. The Applicants add:

Giving insiders at Qwest, for example, access to AT&T's Highly Confidential information, when those companies are direct competitors and AT&T is not even a party in this proceeding, would be inconsistent with the FCC decision and could compromise the interests of AT&T. There are numerous other third parties that have no presence in this case, but whose data may be contained in the FCC document production. Those third parties could have their interests compromised by disclosure of Highly Confidential data to their competitors, particularly to insiders at such competing companies." (Joint Motion, at 4-5.)

3. Opposition to the Motion

Qwest responds that Applicants in their first motion unsuccessfully sought to modify the parties' Nondisclosure Agreement (NDA) – which Joint Applicants drafted and Qwest and others executed without amendment – to preclude in-house attorneys and regulatory employees of competing firms from reviewing

Highly Confidential documents filed with the FCC. Qwest argues that the rationale relied upon in the July 15 ruling applies with equal force here. Qwest states:

The NDA does not specifically mention Verizon's wholesale customers, but it does contain a "Lawyers Only" designation that limits access to all highly sensitive materials to outside counsel and experts and to regulatory counsel, witnesses and regulatory employees who have (a) signed the NDA, (b) have a need to know the information for purposes of case preparation in this proceeding, including any appeals, and (c) do not engage in developing, planning, marketing or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers. The terms of the NDA itself therefore already impose significant restrictions on the type of in-house employees eligible to review any "Highly Confidential" documents. ALJ Walker already has ruled that these restrictions are sufficient to protect Joint Applicants' "Highly Confidential" information. (Opposition of Qwest, at 2; footnote omitted.)

Qwest states that it has staffed this and the other state commission merger dockets predominantly with in-house analysts and witnesses. It adds that, in this case, it has certified to Applicants that each of these individuals satisfies the criteria articulated in the July 15 ruling and in the NDA "Lawyers Only" designation. Qwest states that the evidence in this matter will be compromised if the Commission does not ensure that all parties have identical access to confidential data presented to the Commission on an identical basis. Otherwise, they state, some parties will have access to key pieces of evidence in presenting their testimony while other parties will not. According to Qwest, the Applicants have neither argued nor demonstrated that the NDA "Lawyers Only" designation will fail to protect their interests adequately.

4. Discussion

There is no dispute as to whether the categories of information identified as third-party Highly Confidential documents are sensitive. The dispute involves whether access to this data by the qualified employees of competitor parties would give such parties the opportunity to achieve an unfair competitive advantage harmful both to the Applicants and to the general public. This question must be weighed in light of the issue framed by competitors, namely, whether it is a due process violation for Applicants to grant access to confidential data only to certain parties, while denying access to other parties because they are competitors, even if they sign the NDA.

The Commission must decide how best to balance due process concerns with Applicants' and the public's interest in preventing the disclosure of competitively sensitive information to third-party competitors. The Protective Order adopted in the FCC proceeding provides for different rules governing access compared with those that were adopted in this proceeding. The rules for access to confidential data in this proceeding are within the jurisdiction of this Commission and are not invalidated or modified by rules in other forums, such as the FCC. The fact that different rules have been adopted by the FCC does not automatically justify changing the rules adopted in this proceeding to conform to them.

I conclude that providing access to *all* Highly Confidential data to a company's regulatory counsel and consultants and employees who assist such counsel in case preparation is permissible, provided such individuals sign the Applicants' NDA and that they *do not* engage in any activities for the company relating to developing, planning, marketing, or selling products or services, determining the costs thereof, or designing prices thereof to be charged to customers. Granting access to such individuals subject to the NDA would

protect the data from being disclosed or used by competitors for marketing-related purposes while preserving parties' due process rights to examine data relevant to this proceeding. Applicants present no assertion that the "Lawyers Only" NDA category does not provide complete protection against competitive use of this information.

Granting qualified employees of competitive parties access to such confidential data, subject to the NDA protections, will preserve parties' ability to complete their case preparation and to develop a complete record in this proceeding. As pointed out by Qwest, the information that they seek is relevant to the issue of whether Verizon's acquisition of control of MCI would adversely affect competition, including the resulting prices that Verizon would be able to charge with the disappearance of MCI as a competitor.

As already noted in the July 15 ruling, Applicants *should* be permitted to withhold access of the designated highly sensitive confidential data from those employees or agents of a competitor that *do* engage in the excluded activities for the competitor. Even if an employee of a competing company signs the NDA and does not disclose such highly confidential information to another individual, the employee would still retain knowledge of the confidential information. Even assuming the employee in good faith refrained from disclosing such information to others for competitive advantage, such an employee might still be influenced by competitively sensitive knowledge learned through this proceeding in the course of making competitive business decisions.

Accordingly, it is reasonable to permit Applicants to withhold disclosure of the designated highly competitive materials from such employees or agents that are also engaged in marketing activities for the company even if they sign the NDA. Such an approach is consistent with how the Commission has treated

access to confidential data by parties that are competitors in past telecommunications proceedings.³

5. Adopted Procedures for Access to Highly Confidential Data

In order to balance the Applicants' concerns regarding protection of highly confidential data against parties' due process rights to discovery and development of a complete record, the following procedures were adopted in the July 15 ruling and continue in effect. These procedures apply only to those limited categories of documents identified by the Applicants as Highly Confidential.

Applicants must provide access to Highly Confidential materials sought by the following reviewing representatives of parties that are competitors of the Applicants: regulatory counsel and witnesses (on the condition that they do not engage in activities for the company, as defined below), and permitted regulatory employees of the party, all of whom must sign the Applicants' NDA. Permitted regulatory employees shall be defined as those who have a need to know the information for purposes of case preparation in this proceeding, including any appeals, and who do not engage in developing, planning, marketing or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers.

The fact that Highly Confidential data has already been provided to certain parties (e.g., TURN) indicates that the data is relevant to the proceeding. It is therefore unnecessary for other parties to make a separate showing as to

³ See, for example, the ALJ Ruling dated November 16, 1995, in R. 93-04-003/I.93-04-002 entitled "ALJ Ruling Concerning Proposed Protective Order of GTE California Incorporated."

relevance as a condition of gaining access to such data. If an individual representing a competitor that is a party in the proceeding signs the NDA and is not engaged in marketing or related activities for the company, as previously described, Applicants are directed to provide access to such parties' representatives subject to the restrictions in the NDA.

Applicants are permitted to deny access to non-regulatory personnel (including attorneys) who are in any way engaged in developing, marketing or pricing competitive products or services as previously described.

To the extent that prepared testimony or other exhibits prepared for this proceeding may contain such Highly Confidential information, such testimony or other exhibits should be identified with the label "Lawyers Only" and restricted in access.

IT IS RULED that:

1. The rules set forth above are reaffirmed relating to the terms by which access to third-party Highly Confidential materials of Applicants shall be provided to certain representatives of interested parties that are also competitors of the Applicants.
2. Applicants are directed to promptly respond to outstanding data requests by competitors and other parties with similar outstanding requests in accordance with the directives in this ruling.
3. Applicants' Joint Motion for Heightened Protection of Highly Confidential Third Party Data is denied.

Dated August 5, 2005 in San Francisco, California.

/s/ GLEN WALKER

Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Administrative Law Judge's Ruling on Applicants' Motion for Heightened Protection of Highly Confidential Third Party Data by using the following service:

☒ E-Mail Service: sending the entire document as an attachment to all known parties of record that have provided electronic mail addresses.

☒ U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Dated August 5, 2005, at San Francisco, California.

/s/ ERLINDA PULMANO

Erlinda Pulmano

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.